STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 13, 2005
v	No. 254024 Macomb Circuit Court
GARY LEN VANREYENDAM, Defendant-Appellant.	LC No. 02-003177-FC

Before: Sawyer, P.J., and Markey and Murray, JJ.

PER CURIAM.

I. Introduction

Defendant Gary VanReyendam appeals his jury trial convictions of first-degree premeditated murder, MCL 750.316(1)(a), and conspiracy to commit first-degree murder, MCL 750.157a. Defendant was sentenced to life imprisonment without the possibility of parole for his convictions. On appeal, defendant raises issues related to the trial court's order setting aside the use immunity agreement[1], an evidentiary issue raised at trial, and the effectiveness of his trial attorney. Although we reject defendant's evidentiary and ineffective assistance of counsel claims, we vacate the trial court's opinion and order regarding defendant's motion to suppress evidence and remand this case for further proceedings consistent with this opinion.

Defendant's convictions arise out of the 1994 shooting death of Edward McMahon. In an apparent case of mistaken identity, McMahon was shot once in the forehead as he sat on the lawn outside his Clinton Township apartment. According to defendant, the homicide was investigated by Clinton Township Police and, by 1996, the police had relatively little information about the crime, except that they believed that Jeffrey Messina, originally a codefendant in this case, was involved. The homicide was a "cold case" until defendant provided law enforcement officials with information relating to the case. In 1998, defendant entered into an agreement with the prosecutor's office, through which defendant agreed to make a complete and truthful statement and providing him with use immunity. In 2000, defendant entered into a separate agreement with the prosecutor's office, through which the prosecutor agreed not to use defendant's

[1] See *People v Jones*, 236 Mich App 396, 399 n 1; 600 NW2d 652 (1999) for a definition of use immunity.

statements as direct evidence or for impeachment purposes. Defendant asserts that he provided vital information that allowed the crime to be solved. According to defendant, the police did not know about the involvement of Quincy Johnson (the person who shot McMahon), Willie Pirtle (the person who allegedly drove the shooter to the scene), and Terry Mitchell (at whose house Messina delivered the murder weapon to Johnson) until defendant gave them those names. However, when Johnson, Pirtle, and Mitchell were arrested, they also cooperated with the police and avoided being charged with murder by implicating and then testifying against defendant pursuant to their own plea agreements.

On February 24, 2003, after being bound over for trial, defendant filed a motion to suppress tainted evidence. Defendant specifically argued that any evidence derived from his immunized statements could not be used against him at trial. An evidentiary hearing was held in connection with defendant's motion to suppress, and in a written opinion and order, the trial court denied defendant's motion.

II. The Immunity Agreements

The evidence presented to the trial court during the pretrial evidentiary hearing established the following sequence of events. Defendant was arrested in January 1998, after being caught with three hundred to four hundred pounds of marijuana. As defendant was facing both state and federal charges, he met with state and federal officers several times. As a result, he received some consideration regarding his state sentence. Just before he entered federal prison, in an effort to get a reduction of that sentence, defendant agreed to talk to the state and federal authorities about McMahon.

Defendant spoke with these law enforcement authorities on January 28, 1998, and gave generalized statements about how McMahon was killed. Before agreeing to speak, however, defendant (while represented by counsel) reached an immunity agreement with the Macomb County Prosecutor's Office, the contents of which were set out in a March 4, 1998, letter written by defendant's attorney and signed by both parties.

By 2000, no one had been charged in the 1994 homicide. In recorded conversations with Clinton Township Police Lieutenant Terry Waldock in 2001, defendant disclosed the names of some people he claimed were involved in the shooting, including Mitchell, Johnson, and Messina. The police developed the theory, from conversations with defendant, that Messina hired Johnson to shoot Wayne Werth, that Mitchell helped obtain a weapon, that Pirtle drove Johnson to the location, and that through some terrible mistake, McMahon was shot instead.[2] Both Lieutenant Waldock and Clinton Township Detective William Furno agreed that defendant was the only person who ever provided them with names of people involved in the shooting.

In all his discussions with the police, defendant portrayed himself as a witness, and not as someone who had any involvement in the crime. Defendant allegedly provided vague details,

[2] Before receiving information from defendant, the police obtained information about the shooter from Dawn Boscaglia, the girlfriend of Messina's brother, John. Boscaglia indicated that she had seen the shooter on one or several occasions.

partial identities, and incomplete names, although it eventually became clear to law enforcement authorities that he knew a lot more and was much better acquainted with the individuals that were involved. Chesterfield Township Sergeant Earl Rinske, formerly of COMET,[3] stated:

> Mr. VanReyendam indicated that he had knowledge of what had taken place. Did not [sic] have knowledge that that was the intended action that took place, being the murder.
>
> * * *
>
> He indicated that he had some involvement in that he knew the people involved, had possibly introduced those people to each other, but had not known that that introduction would lead to a homicide.
>
> * * *
>
> Mr. VanReyendam made it very clear that he had no direct involvement or knowledge of the murder or the planning of the same murder and was acting solely as a witness to help solve a crime that he was not involved in.

Sergeant Riske said that the information that defendant provided was enough to "identify possible suspects, but solve the crime, no." Macomb County Assistant Prosecutor Eric Kaiser recalled that, on February 2, 2001, before one of defendant's interviews, Lieutenant Waldock phoned the assistant prosecutor and said that defendant's attorney[4] "wanted some assurances" regarding "what would happen" to defendant. Kaiser agreed that he would not use defendant's statements against him as direct evidence or for impeachment purposes.

FBI Special Agent Foltz indicated that he never felt that defendant gave full and complete information, and thought defendant was "holding back." According to Agent Foltz, federal officials had three or four "debriefings" with defendant and, although defendant cooperated, the discussions were not "fruitful" and defendant's "heart wasn't in it."

According to Lieutenant Waldock, police officials wanted defendant to take a polygraph examination to verify the information he provided them.[5] A polygraph examination was first scheduled for February 8, 2001. Defense counsel and the police "went around for about two weeks" to decide on acceptable language for the question; however, defendant did not appear at

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[3] COMET is an acronym for the County of Macomb Enforcement Team.

[4] Defendant was represented by a different attorney when the oral agreement was recited than he was when the written agreement was made.

[5] Toward the end of the transcribed conversation defendant had with Lieutenant Waldoch and Detective Furno, defendant agreed, if requested, to take a polygraph examination to verify the truthfulness of his statements.

the first scheduled polygraph examination. Lieutenant Waldock gave defendant a new polygraph examination date of February 15, 2001, and defendant again failed to appear. Defense counsel suggested that defendant could not come to the examination because of work; Lieutenant Waldock recalled that it was because defense counsel wanted defendant to have a private examination first. Lieutenant Waldock also said, however, that defendant failed to show up "on advice of counsel." Defendant took neither a state nor private polygraph examination. According to Detective Furno, information had been obtained from other sources, including Werth and Brian McCarthy. Lieutenant Waldock and Detective Furno eventually became convinced that defendant had not given a "complete and total disclosure," and that he was, in fact, involved in the murder plot.

Following the evidentiary hearing, the trial court denied defendant's motion to suppress through a written opinion and order. The trial court concluded that the written 1998 agreement and the oral 2001 agreement contained essentially the same terms. The trial court then found as a matter of fact that defendant would have had to "fulfill his obligations under the immunity agreement before seeking its protections," and that defendant "clearly violated and blatantly breached the immunity agreement," by holding back information, providing "materially false information," and refusing to take a polygraph examination. The trial court therefore refused to enforce the written agreement, declaring it null and void.

A. Standard of Review

In exercising our appellate function, we will not disturb a trial court's factual findings unless they are clearly erroneous. *People v Echavarria*, 233 Mich App 356, 366; 592 NW2d 737 (1999). A trial court's legal conclusions are reviewed de novo. *People v Matuszak*, 263 Mich App 42, 47; 687 NW2d 342 (2004).

B. Analysis

Defendant contends that his Fifth Amendment "rights" were violated because the trial court failed to suppress evidence derived from his "immunized" statements. Defendant's principal focus is on *Kastigar v United States*, 406 US 441; 92 S Ct 1653; 32 L Ed 2d 212 (1972), and its progeny. Defendant argues that *Kastigar* precludes the prosecutor from using his statements at trial, or any evidence that was discovered through information obtained from his statements. Because the police would never have known about Pirtle, Mitchell, or Johnson without defendant first informing the police of their involvement, defendant maintains that the immunity agreement precludes the use of their testimony against him. We conclude that because defendant's statements were not compelled by the government, *Kastigar* does not apply to this case.

Additionally, we hold that the trial court clearly erred in one of its factual findings, and failed to make findings on several critical issues. Specifically, in his motion to suppress tainted evidence, defendant requested that the trial court hold an evidentiary hearing to determine the nature and extent of the promises made by the prosecution, the level and extent of defendant's cooperation, and whether there had been any taint resulting from the prosecution's use of the information provided by defendant. As a practical matter, the answer to these questions first depends on whether the parties were operating under the written agreement or the oral agreement entered into between defendant and the prosecutor's office. Contrary to the trial court's findings,

the terms of the agreements were not essentially the same. Thus, it was imperative that the trial court determine under which of the agreements the parties were operating before applying contract principles to determine the scope of the parties' agreement.

1. *Kastigar*

In *Kastigar*, the petitioners were subpoenaed to appear before a United States grand jury to provide testimony pursuant to a grant of immunity under 18 USC §§ 6002 and 6003. *Kastigar*, *supra* at 442. When the petitioners appeared, they refused to testify, asserting their Fifth Amendment right against self-incrimination. *Id.* The petitioners were therefore held in contempt, a decision that was affirmed by the United States Court of Appeals for the Ninth Circuit. The Supreme Court affirmed, noting that the Fifth Amendment and the federal use immunity statute were coextensive. *Id.* at 453. The Court held that in immunity cases, when a defendant establishes that he gave compelled testimony in a court proceeding after being granted immunity, the government cannot use any evidence against that defendant that was derived from his testimony. Instead, the evidence used against the immunized defendant must be from an independent source. *Id.* at 460-462.

Contrary to defendant's argument, the constitutional principles regarding the Fifth Amendment right against self-incrimination set forth in *Kastigar* are inapplicable to the instant case because defendant never asserted his Fifth Amendment right against self-incrimination, and consequently his statements were not compelled by the prosecution.[6] See *United States v Eliason*, 3 F3d 1149, 1153 (CA 7, 1993); *United States v Gutierrez*, 696 F2d 753, 756 n 6 (CA 10, 1982). In *Eliason*, the defendant contended that he was entitled to a *Kastigar* hearing to determine whether the government used immunized testimony against him. In entering into a voluntary guilty plea, the defendant had agreed to cooperate with the government and provide truthful information in exchange for a sentencing recommendation. *Eliason*, *supra* at 1151. The court indicated that *Kastigar* applies when a defendant asserts his Fifth Amendment right against self-incrimination and then gives *compelled* testimony or evidence in a court proceeding based upon a promise of immunity or under a threat of contempt. *Id*. at 1152. Therefore, as noted in *Eliason*, "compulsion" is "not present where the act proceeds from the exercise of choice or free will, self-impelled and freely undertaken, and unconstrained by interference." *Id*. at 1152 n 2. Similarly, in *Gutierrez*, where the defendant voluntarily and knowingly made a statement in return for immunity from state prosecution, the court noted that the constitutional principles in *Kastigar* do not apply when a defendant voluntarily agrees, with full knowledge of her rights, to make a statement. *Gutierrez*, *supra* at 756 n 6. The *Gutierrez* court concluded that the Fifth Amendment is inapplicable absent compulsion. *Id*.

Although *Kastigar* does not apply to this case, a defendant may receive immunity by entering into an agreement with the prosecution to provide information in exchange for a grant of immunity. *Eliason*, *supra* at 1152 ("Compelling a suspect to give testimony is not the only

[6] Because we conclude that a *Kastigar* analysis is inapplicable this case, we need not delve into the more unclear issue of whether the *Kastigar* protections apply to non-evidentiary issues. See *United States v Serrano*, 870 F2d 1, 16 (CA 1, 1989), and cases cited therein.

source of a prosecutorial obligation to refrain from using information; such an obligation also may arise as part of an agreement under which the suspect provides information in exchange for a promise from the prosecutor not to use it against him."); *United States v Plummer*, 941 F2d 799, 802 (CA 9, 1991) ("In addition to statutory immunity, the government can also grant varying degrees of immunity in informal agreements with individuals. 'Informal immunity' is granted in a variety of circumstances short of the defendant having claimed the Fifth Amendment privilege."); *United States v Pelletier*, 898 F2d 297, 301 (CA 2, 1990) ("To secure a defendant's cooperation and plea, the government may informally grant him use immunity in exchange for his cooperation.").

These types of agreements have commonly been referred to by the federal courts as "informal immunity" or nonprosecution agreements. *United States v Castaneda*, 162 F3d 832, 835 (CA 5, 1998); *Plummer*, *supra* at 802. In interpreting such agreements, our courts must apply ordinary contract principles (i.e., apply the terms of the actual agreement), heightened by judicial discretion with respect to whether the "ends of justice" would be served by enforcing such agreements. *People v Lombardo*, 216 Mich App 500; 549 NW2d 596 (1996) (plea agreements are interpreted using ordinary contract principles); see also, *United States v Andreas*, 216 F3d 645, 663 (CA 7, 2000) (recognizing that both immunity agreements and plea agreements are to be interpreted utilizing ordinary contract principles); *Castaneda*, *supra* at 835 (nonprosecution agreements, like plea bargains, are interpreted in accordance with general principles of contract law); *Plummer*, *supra* at 802 (contract principles apply to immunity agreements). As stated by the *Lombardo* Court:

> The authority of a prosecutor to make bargains with defendants has long been recognized as an essential component of the efficient administration of justice. *People v Jackson*, 192 Mich App 10, 15; 480 NW2d 283 (1991). In light of the prosecutor's expansive powers and the public interest in maintaining the integrity of the judicial system, an agreement between a defendant and a prosecutor affecting the disposition of criminal charges must be reviewed within the context of its function of serving the administration of criminal justice. *People v Abrams*, 204 Mich App 667, 672; 516 NW2d 80 (1994); *Jackson*, *supra*. Because strict contractual theories and principles peculiar to commercial transactions may not be applicable, review of the bargain at issue is based on not only the terms of the agreement, but also on whether the ends of justice are served by enforcing its terms. [*Lombardo*, *supra* at 510.]

See, also, *Jackson*, *supra* at 15. Thus, the terms of the immunity agreement will control, but the courts retain some authority to ensure that enforcing (or not enforcing) such agreements in a court of law will meet the ends of justice.

Federal courts faced with challenges to the enforceability of informal immunity agreements have likewise relied upon the terms of the agreement, with added scrutiny, to ensure that the government adheres to its agreements. As the Eighth Circuit aptly explained:

> While "[t]he protection given a defendant by an immunity agreement is coextensive with the protection against self-incrimination afforded by the Fifth Amendment," *United States v Abanatha*, 999 F2d 1246, 1249 (8th Cir, 1993) (citing *Kastigar*, 406 US at 453; 92 S Ct 1653), *cert. denied*, 511 US 1035; 114 S

> Ct 1549; 128 L Ed 2d 199 (1994), *the immunity agreement itself governs the scope of the immunity involved*. When a defendant enters an informal immunity agreement with the government rather than asserting his Fifth Amendment privilege against being compelled to incriminate himself, "the scope of informal immunity is governed by the terms of the immunity agreement." *United States v Luloff*, 15 F3d 763, 766 (8th Cir, 1994). *This is true because an immunity agreement is likened to a contract between the government and the defendant, a concept universally recognized by courts faced with enforcing such agreements*. See, *id.*, *United States v Crawford*, 20 F3d 933, 935 (8th Cir, 1994) (holding that immunity agreements are analogous to plea agreements and are enforced under principles of contract law, within the constitutional safeguards of due process); *United States v Conway*, 81 F3d 15, 17 (1st Cir, 1996); *United States v Cantu*, 185 F3d 298, 302 (5th Cir, 1999); *United States v Brown*, 979 F2d 1380, 1381 (9th Cir, 1992); *United States v Nyhuis*, 8 F3d 731, 742 (11th Cir, 1993), *cert. denied*, 513 US 808; 115 S Ct 56; 130 L Ed 2d 15 (1994). McFarlane recognizes this concept as well. (See Appellant's Br. at 20.) Thus, the immunity agreement defines the extent of the immunity granted to the defendant and Fifth Amendment principles define the protection to be afforded the defendant within the scope of the granted immunity. [*United States v McFarlane*, 309 F3d 510, 514 (CA 8, 2002) (emphasis added).]

Further, it is the terms of the immunity agreement that determines the scope of the remedies in the event of a breach. *People v Aleman*, 286 F3d 86, 89-90 (CA 2, 2002); *United States v Fitch*, 964 F2d 571, 576 (CA 6, 1992); *Pelletier*, *supra* at 302; *United States v Irvine*, 756 F2d 708, 710-712 (CA 9, 1985).[7]

2. Interpretation of Agreements

As previously stated, in ruling on defendant's motion to suppress, the trial court did not indicate which agreement entered into between defendant and the prosecution controlled. Rather, the trial court determined that, "As the essential terms of the two agreements are the same, it is not necessary to determine which agreement was in effect during the interviews; the same result would be reached under either agreement."

Under ordinary contract principles, if the language of a contract is clear and unambiguous, its construction is a question of law for the court. *Michigan Nat'l Bank v*

[7] As defendant recognizes, a decision by a prosecutor that the agreement has been violated by a defendant must be subjected to judicial review. *United States v Meyer*, 157 F3d 1067, 1076-1077 (CA 7, 1998); *Stolt-Nielsen SA v United States*, 352 F Supp 2d 553, 560 (ED PA, 2005). But this is merely stating the obvious for, as in this case, when a prosecutor claims the "deal is off" because of a defendant's actions or inactions, the defendant will likely come forward and seek judicial enforcement of the agreement. Equally feasible is a prosecutor bringing a motion before the trial court to set aside the agreement based on a defendant's breach. Either way, unless both sides agree that the agreement is no longer binding, we are confident the issue will be brought before the trial court prior to trial.

Laskowski, 228 Mich App 710, 714; 580 NW2d 8 (1998). Contract language should be given its ordinary and plain meaning. *Id*. Based on these principles, we find that the trial court erred in determining that the essential terms of the written agreement and the oral agreement were the same and that it was unnecessary to determine which agreement was in effect during the interviews. As evidenced by the plain language of the two agreements, their terms were materially different.

The written agreement, which was drafted by defendant's first attorney, provided as follows:

> 1. Mr. VanReyendam agrees to make a complete and truthful statement of his knowledge of the subject of the investigation and other targets that police may be interested in investigating.
>
> 2. No statement made or other information provided by Mr. VanReyendam or myself during this proffer discussion will be offered for any purpose against Mr. VanReyendam, including but not limited to, any criminal prosecution, forfeiture proceeding and/or sentencing of Mr. VanReyendam.
>
> 3. Mr. VanReyendam shall, at the option of your office, be given a polygraph examination to verify the truthfulness and completeness of any statements given as a part of this agreement. That should the result of the polygraph examination or conversation with the polygraph examiner indicate that Mr. VanReyendam has not been truthful, the promises by your office in this letter are null and void.

Thus, under the terms of the written agreement, defendant agreed to make a complete and truthful statement of his knowledge of the subject of the investigation and other targets. The agreement further provided defendant with immunity, indicating that no statement provided by defendant would "be offered for any purpose against" him. Finally, the agreement provided that defendant could be given a polygraph examination, at the option of the prosecutor's office, "to verify the truthfulness and completeness of any statements given as a part of this agreement."

The terms of the oral agreement, made almost three years after the written agreement, were not as detailed; however, it is obvious that its terms were not the same as those contained in the written agreement. Prior to defendant's statement to Lieutenant Waldoch and Detective Furno, defendant's second attorney placed his interpretation of the agreement on the record:

> I had a phone conversation this afternoon with Eric Kaiser regarding . . . the statement that was gonna [sic] be given on tape. It was Mr. Kaiser's position that . . . as a result of anything that is disclosed on this tape, that . . . that would not be used against Mr. VanReyendam . . . either . . . directly in evidence or for impeachment purposes and . . . I'm sure that that'll [sic] be confirmed by Mr. Kaiser but he indicated that that should be put on record [sic].

At the evidentiary hearing, Kaiser confirmed that the "assurance" he provided defense counsel was that anything defendant told the police that day "would not be used against him as either substantive or impeachment evidence were he to end up falling into the position of a

defendant rather than a cooperating witness." There was no mention by anyone regarding defendant's obligation to provide truthful and complete statements[8], and the immunity granted by the prosecutor's office was limited to defendant's statements not being used against him as direct evidence or for impeachment purposes. In addition, toward the end of the transcribed conversation defendant had with Lieutenant Waldoch and Detective Furno, defendant agreed, if requested, to take a polygraph examination to verify the truthfulness of his statements. However, this was not a term of the agreement with the prosecutor's office, but was an agreement made with the law enforcement officers.[9]

Thus, upon our review of the record, we conclude that the trial court clearly erred in finding that the two agreements were "essentially the same." As detailed above, the written agreement contained a requirement that defendant provide complete and truthful statements, that he take a polygraph if requested by the prosecutor, and that if the polygraph revealed that he did not provide complete and truthful statements, the agreement was null and void. The oral agreement contained nothing explicit with respect to those terms. Therefore, the agreements were not the same, and were instead materially different.[10]

These differences are critical when reviewing the trial court's findings. Here, the trial court concluded that defendant was required to both provide complete and truthful statements and take a polygraph, and that because he failed to do either, the agreement was null and void. In conjunction with these findings, the trial court neglected to determine which of the agreements controlled the parties' actions. But if the oral agreement was controlling, it is possible that neither of these two obligations were placed on defendant, nor was there a contractual remedy for failure to comply. Kaiser's own testimony demonstrates the conflict we now see, in that at one point he contended that the written agreement would continue if there was no terminating language, while later stating that the oral agreement, being a subsequent agreement between the same parties, would naturally control over the initial agreement. Moreover, the evidence reflects that the prosecutor first asked defendant to take a polygraph after the oral agreement, yet the record reveals that only the written agreement contained such a requirement.

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[8] The prosecution has not argued that the oral agreement had an implied term requiring complete and truthful statements, most likely because of the trial court's conclusion that the agreements were essentially the same. We leave to the trial court on remand to determine if such an implied term existed. See, e.g., *People v McIntire*, 461 Mich 147, 152-160; 599 NW2d 102 (1999) (holding that truthful statement requirement cannot be implied into immunity provided by statute because Legislature provided no truthfulness requirement as a condition of immunity).

[9] Our Supreme Court has determined that the police lack the authority to make a binding promise of immunity or not to prosecute. *People v Gallego*, 430 Mich 443, 452; 424 NW2d 470 (1988). Thus, it would not be within the province of the law enforcement officers to add terms to the agreement entered into between defendant and the prosecutor's office.

[10] The trial court could not rely on Lieutenant Waldoch's or Detective Furno's testimony about the terms of the oral agreement, since the transcription of the agreement, which was admitted into evidence, clearly established the terms agreed to by defense counsel and the prosecutor. The police officers' testimony could not contradict the terms set forth in the transcript and confirmed by the prosecutor.

As both the written agreement and the oral agreement contained different terms and protections for defendant, it was absolutely necessary that the trial court first determine whether the parties were operating under the written agreement or the oral agreement (or both) before it could determine what defendant's obligations were, as well as the protections he was to receive in return or the consequences for failing to meet those terms. Such factual determinations go to the very crux of this case. Accordingly, we vacate the trial court's order and opinion and remand this case for a determination of whether the parties were operating under the written or oral agreement. The trial court should then determine, based upon the record from the prior evidentiary hearing, whether defendant breached the agreement, and if so, the appropriate remedy.

III. Separate Trial[11]

Defendant's next argument is that the trial court abused its discretion in failing to initially grant a separate trial from that of codefendant Messina. The trial court had originally denied defendant's pretrial motion to sever, but reconsidered and reversed that decision during trial. As defendant has noted, our review is limited to whether the trial court abused its discretion. *People v Stricklin*, 162 Mich App 623, 630; 413 NW2d 457 (1987).

Defendant raised this issue by filing a pretrial motion to sever, which was denied. However, the following exchange occurred between the court and counsel during trial when the court reconsidered and granted the motion:

> The Court: And it has been a problem with me, in my own mind, about why I should have not given separate trials. And now I'm to the point where I've got to agree and I am severing it. *As long as there's no objection that now we* begin your client's case [codefendant Messina's case] from the get go, *continue with Mr. Thomas' client [defendant]*. I don't want to say his name, because I always screw it up. Mr. Vanreyendam [sic].
>
> Mr. Thomas [defense counsel]: We'll get it down just fine, Judge.
>
> The Court: Vanreyendam [sic]. So is there a request for that at this point?
>
> Mr. Thomas: *I have no objection. We want to go forward.*
>
> The Court: We're going to go forward with Mr. Vanreyendam [sic]. We will begin your [codefendent Messina's] trial immediately at the conclusion of this trial. The separate motion is granted. [Emphasis added.]

In light of defense counsel's acquiescence to proceed with a separate trial, rather than starting a separate trial anew, we conclude that the issue has been waived. Where an issue is waived by "the intentional relinquishment or abandonment of a known right," it is "extinguished" and there

[11] We address defendant's remaining issues for the sake of judicial economy, in the event that the trial court again denies defendant's motion to suppress tainted evidence.

is no error to review. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000) (citations omitted).

IV. Ineffective Assistance of Counsel

The final argument for appellate relief is defendant's assertion that his trial counsel performed below a constitutionally acceptable standard when he failed to file a brief along with the motion to suppress tainted evidence, for not filing a post-hearing brief (though none was requested), and by not objecting to continuing defendant's trial after the court granted his motion to sever.

Defendant did not preserve this issue by raising it in a motion for a new trial or an evidentiary hearing. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). Because no *Ginther*[12] hearing was held, this Court's review is limited to mistakes apparent on the record. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997). To establish a claim of ineffective assistance of counsel, the burden is on defendant to show that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment, and that the deficient performance prejudiced the defense so as to deprive defendant of a fair trial. *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997). There is a strong presumption that counsel's conduct was reasonable. *Id.* This Court will not substitute its judgment for that of trial counsel regarding matters of trial strategy, *People v Avant*, 235 Mich App 499, 508; 597 NW2d 864 (1999), nor will it assess counsel's competence with the benefit of hindsight, *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). The fact that a strategy was not successful does not amount to ineffective assistance. *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987).

Defendant argues that counsel was ineffective for not filing a brief after the three-day evidentiary hearing on his motion to suppress tainted evidence. Defendant acknowledged that counsel had already filed a written motion (with citations), and that the trial court did not request additional briefing. There is a strong presumption that counsel's conduct was reasonable, *Mitchell, supra* at 156, and defendant presents no compelling argument that counsel's failure to file a second document with the court, after a three-day hearing and numerous witnesses, was a serious mistake.

Defendant also argues that counsel was ineffective for failing to file a motion for a mistrial when the trial court severed the trials of the two codefendants. Defendant asserts that prejudicial evidence had been placed before the jury before the trials were severed. It is true that defense counsel successfully objected during trial whenever plaintiff attempted to introduce evidence of codefendant Messina's statements. However, as the prosecutor argues, codefendant Messina's statements would likely have been admissible as part of the conspiracy alleged in this case. MRE 801(d)(2)(E). Further, much of the evidence regarding codefendant Messina supported defense counsel's attempt to shift blame away from defendant and could have led the jury to believe that defendant was not involved in the crime. To the extent that counsel made a

[12] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

strategic decision to proceed with trial, the fact that it may not have worked does not constitute ineffective assistance. *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996).

For these reasons, we hold that defendant has not overcome the presumption that counsel's actions were reasonable or that any alleged defects detrimentally affected the result of the trial. *People v Fike*, 228 Mich App 178, 181; 577 NW2d 903 (1998).

We vacate the trial court's order and opinion denying defendant's motion to suppress tainted evidence and remand this case for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Jane E. Markey
/s/ Christopher M. Murray